

JONATHAN VAMBE
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE 8 MAY 2014 AND 13 SEPTEMBER 2017

Criminal Appeal

S. Mushonga, for the appellant
E. Mavuto, for the respondent

BERE J: The appellant appeared at the Magistrates Court sitting at Bindura facing 3 counts of aggravated indecent assault and 4 counts of indecent assault as defined in terms of section 66 (1) (a) (ii) and 67 (1) (a) (ii) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], respectively.

The appellant pleaded not guilty but at the end of a protracted trial, he was convicted of 6 counts and sentenced as follows:

Count 1	-	2 years imprisonment
Count 3	-	2 years imprisonment
Count 4	-	1 year imprisonment
Count 5	-	1 year imprisonment
Count 6	-	1 year imprisonment
Count 7	-	1 year imprisonment

Of the total 8 years imprisonment, 4 years were suspended for 5 years on condition of future good conduct leaving the appellant with an effective 4 years imprisonment.

Dissatisfied by both conviction and sentence the appellant noted this appeal.

As against conviction the appellant filed a convoluted notice of appeal which lacked the expected precision and from which one can, but with extreme difficulty decipher the following contentious issues;

- “(i) The court *a quo* misdirected itself by failing to have the appellant acquitted at the close of the state case on those charges viz, count 2 and 7 where the state had made a concession the reasoning being that once the state makes a concession, the court is bound by such concessions or alternatively that if the court feels that it is not bound by such concessions, it must give serious considerations to any such concessions.
- (ii) The court *a quo* misdirected itself by convicting the appellant on counts 1, 3, 4, 5, 6 and 7 because the evidence of the complainants were not satisfactory.
- (iii) The court *a quo* misdirected itself in not dismissing the complainant’s evidence once it went against the state outline.
- (iv) That the court *a quo* misdirected itself by basing its conviction on similar fact evidence in that there was no “striking similarities or similarity” in such evidence.
- (v) That the court *a quo* misdirected itself by failing to appreciate that in all the complainants, there was lack of immediate and spontaneous reports of the assaults as laid down in the case of State vs Banana 2000 (1) ZLR 607 (S).”

The appeal against sentence was premised on the contention that overallly the sentence imposed by the court *a quo* was excessive and that it “induced a sense of shock and horror.”

In its response to the appeal against conviction, the respondent conceded that the appellant should have been acquitted in respect of count 7 as the evidence was insufficient to sustain a conviction.

The respondent also felt that from the evidence that was led in the court *a quo* in respect of count 3 the appellant should have been convicted of indecent assault since there was no evidence of anal penetration to justify aggravated indecent assault.

As for the rest of the counts, the respondent's position was that there was no merit in the appeal and prayed for its dismissal.

Appeal against conviction

Our legal position is settled that once an accused person is put on his defence at the close of the state case, albeit wrongly, at the conclusion of the trial the trial court cannot ignore the evidence that comes out as a result of the erroneous placing of the accused on his defence. Such evidence has to be taken into account like any other evidence in determining the guilt of the accused. See *State v Kachipare*¹.

I am far from being convinced by the appellant's counsel that he was on firm ground when he raised his first ground of appeal.

It got worse when counsel tried to argue in the alternative that the court *a quo* had not given serious considerations to the evidence tendered in court leading to the convictions in counts 1, 3, 4, 5 and 6.

The first count of aggravated indecent assault pertained to the assault perpetrated against Iryvine Mushuta. His testimony which was accepted by the court *a quo* showed that the appellant who had removed all his clothes overpowered the complainant whose clothes he forcibly removed, and caressed him whilst the two had body contact, leading to anal penetration and ejaculation by the appellant. The witness was found to have been a very credible witness and in my view the record of proceedings confirms this. Not only was there anal penetration but the appellant succeeded in forcibly sinking his tongue into the complainant's mouth. The conviction of the appellant in count 1 cannot be seriously challenged. It was ill informed to challenge it.

In count 3, the aggravated indecent assault was against Leon Rukotche. The evidence on record suggests that the appellant fondled and pinched the complainant's buttocks on three separate occasions and on different dates. The appellant should have been charged with three counts of

indecent assault but was charged with one charge of aggravated indecent assault. There is no evidence of penetration as envisaged by section 66(i)(a)(ii) of the Code and in my view the court

1. 1998 (2) ZLR 271 (S)

a quo should have convicted the appellant with one count of indecent assault and the conviction is accordingly altered. But sight must not be lost that the appellant could have been easily convicted of three counts of indecent assault if he had been so charged.

In count 4 the court *a quo* relied on the evidence of Costa Mhariwa and the assault that was established consisted of the appellant putting his leg on the complainant and touching his buttocks which caused so much discomfort and panic on the complainant. The complainant's immediate reaction was to flee from the appellant and lodge a report with his brother "to get help"². In my view, if regard is had to the provisions of section 67(1)(a)(ii) of the Code, the behaviour of the appellant would neatly fit the definition of an indecent assault as charged.

Counts 5 and 6 dealt with indecent assaults perpetrated against Kelvin Shangwa and Craig Chiriseri respectively. The findings of the court *a quo* cannot be challenged or interfered with because they accord well with the evidence canvassed. The two witnesses said they were fondled on their buttocks and had their genitals caressed by the appellant.

As regards count 7, I agree with both counsels that the conviction was wrongly made and that it should be set aside.

There is nothing much that turns on the alleged delays in reporting the various acts of assault especially if regard is had to the ages of the complainants and the great hold which the appellant had on them given his influential position within the particular community. The appellant was held in high esteem by the victims as a "man of God" and virtually all the victims were being spoilt by various consumables sourced by the appellant. The learned magistrate dealt with the delayed report in the following manner in his judgment:

“Ordinarily the evidential requirement that a victim of sexual abuse should report the crime in time as soon as possible after its occurrence proceeds from the assumption that she/he is aware that a wrong has been committed against him/her.

2. record page 87

It is quite obvious that in some of these cases that the complainants were in a state of confusion over whether what had happened was wrong but there is no doubt that they felt a sense of shame and this is self-evident. This is why some of them said they wondered if it was proper for another male to kiss another male. These young boys were still immature being less than 16 years of age at the time.

The conventional practice of reporting soon afterwards after an offence has been committed was not followed in all of the counts in this case but this is explicable in terms of the self-evident immaturity and naivety already mentioned earlier on in this judgment. It certainly would have been quite different had the victims been older and more mature..”³

I am impressed by this sound reasoning and I believe even the appellant’s counsel is. When one looks at the ratio in *S v Banana*⁴ in this regard one must not look at it in a vacuum. Each case must be looked at in its own peculiar circumstances. There is no principle of law which fits into any imaginable situation like a mathematical formula. If it were so a serious injustice would inevitably result.

The appellant’s counsel was ruthless in attacking the court *a quo* by among other things convicting the appellant on similar fact evidence in circumstances where “there was no striking similarity in such evidence”. With respect, a reading of the court *a quo*’s judgment suggests otherwise.

It does seem to me that in raising this argument counsel may have been unaware of the approach adopted by the Supreme Court in the celebrated case of *S v Banana* where the court advocated for a departure from the orthodox approach in treating similar fact evidence. GUBBAY CJ gave the position of the law as follows:

“However, in a recent treatment of the subject in *R v P* [1991] 3 ALL ER 337 (HL) LORD MACKAY of Clashfern L C explained that the law did not require “striking similarity” as an indispensable element of admissibility and that it was unwarranted to restrict the admissibility principle in a manner which gives decisive effect to one particular way of describing probative significance. Thus the test in every case must be not whether the events sought to be proved by the prosecution are strikingly similar to the offence

3. Record pages 29-30
4. *S v Banana (supra)* at p 616A-C

charged, but, whether their probative contribution is such as to outweigh the prejudice to the accused. ...

The significance of this re-statement of the principle is that it focuses attention on the concept that admissibility turns on probative weight which like the question of corroboration, is a matter of logic and common sense, and not a legal doctrine. Whether, of course, the evidence has sufficient probative value to outweigh its prejudicial effect depends on the facts of each case and is necessarily a matter of degree and value judgment.

By emphasizing that “striking similarity” was not to be regarded as a pre-requisite to the admissibility of similar fact evidence, the House of Lords appears to have eased the task of the prosecution in cases where the accused’s alleged behaviour on the different occasions in question bears significant points of relationship, yet does not possess the virtually identical features which the rule in the *Boarman* case required. See *R v H* [1995] 2 ALL ER 865 (HL) at 869e – 870e; *R v Christor* [1996] 2 ALL ER 927 (HL) at 931f – 932g.

The time has now come for this court to follow the lead taken by that august body, the House of Lords. That is the course I propose to adopt in this appeal”.⁵

This new position in the treatment of similar fact evidence was unanimously adopted by the whole Supreme Court bench in the case of *S v Banana (supra)*. It is the current position of our law.

A reading of the record of proceedings with particular reference to the evidence given by each of the victims of the appellant shows that the victims neatly supported each other. The way the victims were specially targeted and the modus operandi by the appellant made it just to admit such evidence in this case as the probative value of such evidence clearly outweighed its prejudicial

effect to the appellant. Under such circumstances the court *a quo* cannot be faulted for relying on such evidence.

Disposition of the appeal against conviction

In the final analysis on conviction I take the following position;

5. *S v Banana (supra)* at pp 616C-A; 617G-H and 618A-C

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| Count 1 | - | the conviction is confirmed |
| Count 3 | - | the appeal succeeds to the extent that the appellant is found guilty of indecent assault as opposed to aggravated indecent assault. |
| Count 4 | - | the appeal is dismissed |
| Count 5 | - | the appeal is dismissed |
| Count 6 | - | the appeal is dismissed |
| Count 7 | - | the appeal is upheld. |

The appeal against sentence

I now proceed to consider sentence.

Notwithstanding that the appellant has partially succeeded in count 3 and that his appeal against count 7 has been successful the criminal actions of the appellant were of an extremely serious nature especially given the ages of the victims all of whom were teenagers.

The evidence suggests the victims were disturbingly traumatised by the conduct of the appellant who literally abused the trust which was bestowed upon him by those parents and

guardians of some of the victims who saw nothing wrong in allowing the appellant to interact with the victims.

I have also paid regard to the very elaborate reasons for sentence given by the court *a quo*. I do not wish to interfere with the sentence of the court *a quo* except to the extent of the success of the appeal. My strong conviction though is that the court *a quo* erred on the side of lenience. I propose to reconfigure the sentence and in doing so I am largely leaning on the approach adopted by the court in the case of *S v Banana (supra)*.

- (1) Counts 3, 4, 5 and 6 (the indecent assault convictions) to be taken together for purposes of sentence, 5 years imprisonment of which one year is suspended for five years on condition that during that period the accused is not convicted of an offence of which indecent assault is an element for which he is sentenced to a term of imprisonment without the option of a fine.
- (2) Count 1 (aggravated indecent assault) 2 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition that during that period the accused is not convicted of an offence of which aggravated indecent assault is an element for which he is sentenced to a term of imprisonment without the option of a fine.

It is ordered that the effective sentence of one year I respect of count 1 is to run concurrently with the effective sentence of 4 years imprisonment on counts 3, 4, 5 and 6.

Hungwe J agrees

Messrs Mushonga, Mutsvairo & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners